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No. 90-720

In the

Supreme Court of the United States

October Term, 1990

ALFREDO DeVARGAS,

Petitioner,

v.

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

In addition and in the alternative to the question set forth in the Petition:

Whether judgment in favor of the respondents should be affirmed even if the Civil Rights Restoration Act of 1987 applies retroactively, thereby making it unnecessary to reach the question of retroactive application?

Resolution of this question involves the following questions:

1. Whether Mason & Hanger-Silas Mason Co., Inc. is a "recipient" of federal financial assistance or part of the "operations" of the Regents of the University of California?

2. Whether judgment should be affirmed on the ground that the contracts at issue are not awards of assistance and do not create a basis for liability under § 504 of the Rehabilitation Act of 1973, when judgment was affirmed by the Court of Appeals in favor of the Respondents Mason & Hanger-Silas Mason Co., Inc., Hook, and Hardwick on this ground independently of consideration of retroactive application of the Civil Rights Restoration Act of 1987?

3. Whether an action for damages (the only relief arguably remaining) can be maintained against the respondents under § 504 of the Rehabilitation Act of 1973 or 42 U.S.C. § 1983 (1988) on the basis of the record in this case? Included in this question are the following questions:

a. Whether the federal regulation at issue is mandatory in nature and does not provide for a discretionary review?

b. Whether the record establishes a lack of intentional discrimination on the part of the respondents or whether the

QUESTIONS PRESENTED – Continued

respondents are entitled to an extension of the grant of qualified immunity entered by the Court of Appeals to the current claims under 42 U.S.C. § 1983 (1988) and § 504 of the Rehabilitation Act of 1973.

RULE 28.1 LISTING

Respondent Mason & Hanger-Silas Mason Co., Inc. ("Mason & Hanger") is incorporated under the laws of the State of West Virginia. The parent corporation of Mason & Hanger is The Mason Company. Mason & Hanger has four subsidiary corporations that are not wholly owned by it: Benchmark Electronics, Inc.; Mason & Hanger Service, Inc.; Mason & Hanger National, Inc.; and Mason Chamberlain, Inc. In addition, Mason & Hanger has one affiliated corporation that is not wholly owned by it or its parent corporation: Duchossois Industries, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

All respondents hereby respectfully urge the Court to deny the issuance of the writ of *certiorari* sought by the petitioner. In the alternative that the Court were to choose to review the judgment below, respondents urge that a writ of *certiorari* should be issued only with respect to Respondents Kerr, Pogna, and Walterscheid and only for the purpose of summary affirmance or remand to the Court of Appeals.

OPINIONS BELOW

This action was resolved below by a series of partial summary judgments and two appeals. The operative facts of

the case were recognized primarily in one opinion by the District Court and one by the Court of Appeals, neither of which are included in the Appendix to the Petition.[1] The Memorandum Opinion and Order of the District Court entered on October 21, 1986, is set forth in the Appendix to this Brief[2] at 1a-11a, and the Opinion of the Court of Appeals entered on April 7, 1988, and reported at 844 F.2d 714 is set forth in the Appendix to this Brief at 13a-43a.

STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, *as amended* 29 U.S.C. § 794 (1988) [hereinafter § 504], is set forth in full in the Appendix to this Brief at 45a-47a. The relevant language of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (Mar. 22, 1988) [hereinafter the Restoration Act], is incorporated into the current version of § 504. United States Department of Energy Interim Management Directive No. 6102, Appendix IV, "Protective Personnel" (Jan. 31, 1978) [hereinafter IMD 6102], which was the basis for the action taken by respondents, is set forth in the Appendix to this Brief at 49a-112a. The regulations which superseded IMD 6102 in 1984, Physical Protection of Security Interests, 10 C.F.R. pt. 1046 (1990), are set forth in the Appendix to this Brief at 114a-134a.

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[1] The Appendix contained in the Petition will be cited herein as "Pet. App."

[2] The separate Appendix to this Brief will be cited herein as "Br. App."

STATEMENT OF THE CASE

A fairly lengthy statement of facts and proceedings below is necessary to clarify the basis for the issues before the Court.

A. Statement of Facts

The facts stated herein are those established in the record below for purposes of the orders granting summary judgment by uncontradicted affidavits, authenticated documents, congressional hearings, deposition testimony, and discovery responses.

1. The Federal Facility, Procurement Contracts, and Regulations at Issue

The Regents of the University of California (the "University") operate facilities at Los Alamos National Laboratory (the "Laboratory") on behalf of the United States Department of Energy ("DOE"), pursuant to a prime procurement contract between DOE and the University. The Laboratory is a DOE facility covering approximately 40,000 acres of rough, heavily forested, mountainous terrain. The Laboratory is involved in atomic weapons development and research, as well as other scientific and highly classified research.

Mason & Hanger-Silas Mason Co., Inc. ("Mason & Hanger") is a West Virginia corporation. Mason & Hanger provides security personnel at several government sites around the country.

Prior to May 1981, security at the Laboratory was provided by a federally employed security force. The *Hearings Before the Subcommittee on Procurement and Military*

Nuclear Systems of the House Committee on Armed Services (Jan. 9, 1981) [hereinafter the *Hearings*][3] involved the transfer of security functions from the then federally employed service to a private contractor. Those *Hearings* detail the nature and history of the security force at the Laboratory; the analysis that led the government to investigate private contracting and to conclude that it was financially beneficial to obtain security personnel from a private contractor; and the selection of Mason & Hanger through competitive proposals.

On May 6, 1981, the University and Mason & Hanger entered into a subcontract, under which Mason & Hanger assumed employment of members of the previously federally employed security force at the Laboratory and began furnishing an enhanced security force for the protection of the Laboratory. The subcontract requires Mason & Hanger to employ, train, and provide security personnel for the protection of the Laboratory. The only function that Mason & Hanger provides at the Laboratory is the provision of security personnel pursuant to the subcontract. All funds or other benefits received by Mason & Hanger for the provision of security personnel at the Laboratory are received pursuant to this subcontract.

The subcontract delegates and charges Mason & Hanger with the responsibility of applying and enforcing DOE regulations relative to the provision of security forces at the Laboratory. In the period from May 1981 until November 1984, IMD 6102 was Appendix M to the subcontract, and Mason & Hanger was required both by federal regulation and by the

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[3] The transcript and exhibits of the *Hearings* are part of the record below.

subcontract to employ only personnel who met the requirements of IMD 6102.

Both IMD 6102 and the 1984 successor regulations provide for two distinct positions for security personnel – guards and security inspectors. The two positions have different responsibilities and have different medical and physical qualifications. Security inspectors have to be able to defend both the physical facilities and the security of the Laboratory from possible "terrorist attack, sabotage, espionage, theft and internal diversion." *Hearings* at 9. Accordingly, all security inspectors have to be capable of, among other things, foot and motor patrols, responding to industrial and forest fires, handling special nuclear materials, and combatting sophisticated terrorist groups. *Id.* at 9-10. Because of the highly sensitive nature of the Laboratory, only security inspectors are deployed there – there are no guard positions available at the Laboratory.

Although IMD 6102 permitted one-eyed individuals to be employed as guards, § A.9.b(5) (Br. App. at 72a), it mandatorily disqualified one-eyed individuals from the position of security inspector, § A.6.b(8) (Br. App. at 67a). IMD 6102 contained no provision for a medical or practical test to obtain a waiver of the medical disqualification of having sight in only one eye. It only provided for medical review of conditions in which the degree of the medical disqualification was at issue. *See* § A.6.c (Br. App. at 68a-69a).

In December 1984, IMD 6102 was superseded by new regulations governing the employment of security personnel at DOE facilities. The successor regulations added a provision that allows DOE (not the contractor) to issue a waiver of the medical disqualification of having sight in only one eye, if the

applicant is otherwise fully qualified and "demonstrates by medical examination and/or practical test . . . the ability to perform effectively and safely all routine and emergency duties." 10 C.F.R. pt. 1046, app. A § G(1)(b) (Br. App. at 129a-130a). The 1984 successor regulations further provide for review of such waivers and administrative appeal within DOE for aggrieved individuals. *Id.*, app. A § G(1)(d)-(e) (Br. App. at 130a).

2. DeVargas' Application for Employment

The petitioner, Alfredo DeVargas, has sight in only one eye. In November 1981, DeVargas submitted an application to Mason & Hanger for employment as a security inspector in response to a job description issued by Mason & Hanger. It is factually disputed whether a position was actually available at that time and whether DeVargas would have been otherwise qualified for a position as a security inspector, if a position were available.[4] Respondents have stipulated to availability

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[4] DeVargas' recitation of his qualifications and statement that they are "undisputed in the record" (Pet. at 4-5) is erroneous. Respondents had included in their motion for summary judgment on the second amended complaint, an issue that DeVargas was not "otherwise qualified." The supporting evidence to that motion shows that, because of the significant security concerns involved, Mason & Hanger required employees to list all prior employment which was investigated in detail. The evidence further shows that DeVargas had discretionarily omitted prior employers in his application; that DeVargas had been officially reprimanded as a police officer for failure to appear for work, for insubordination, and for failure to follow required rules, and that those reprimands had resulted in his resignation as a police officer; and that DeVargas illegally used controlled substances. These matters would have disqualified DeVargas from further consideration. In addition, all applicants would have to obtain a security clearance from DOE, a matter over which respondents

(Continued on following page)

of the position and DeVargas' qualifications, however, solely for purposes of their motions for summary judgment on which judgment below is based.

DeVargas' application states on its face that he had lost sight in one eye. At the time he submitted his application, DeVargas requested to speak with someone at Mason & Hanger regarding the possibility of a job. Respondent Hook, then Administrative Manager of Mason & Hanger, in reviewing DeVargas' application prior to meeting with him, consulted with Robert E. Everhart, Chief of Security for Mason & Hanger, and Respondent Hardwick, then Mason & Hanger's Contract Manager, concerning whether a one-eyed applicant could be employed as a security inspector. They concluded that IMD 6102 mandatorily disqualified one-eyed individuals from positions as security inspectors. Hook then informed DeVargas that he was disqualified from employment as a security inspector. At DeVargas' request, Hook subsequently sent a letter to DeVargas specifying the basis for the disqualification.

More than a year later, in March 1983, DeVargas' counsel sent a letter to Mason & Hanger requesting that it

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have no control. Because of agreement between counsel as to a discovery matter, however, the District Court was requested not to rule on the issue of qualifications at that time. Summary judgment was subsequently rendered on other issues.

The record also reflects that, prior to 1981, DeVargas had been given a "4-F" status by the armed forces because of his lack of sight in one eye and, accordingly, never served in the military. Since his application to Mason & Hanger, DeVargas has been denied employment by a private trucking firm because of Department of Transportation regulations that prohibit one-eyed individuals from driving trucks hauling hazardous materials.

reconsider hiring DeVargas.[5] At that time, Hook, Everhart, and Hardwick again discussed the provisions of IMD 6102 and again concluded that it mandatorily disqualified one-eyed applicants from employment as security inspectors. This time, Hook also contacted Respondent Pogna, a University employee who was then the Laboratory's Assistant Division Leader for the Security and Safeguards Division, to ensure that Mason & Hanger's interpretation of IMD 6102 was in accordance with that of the Laboratory. In response to the inquiry, Pogna asked Respondent Walterscheid, who is also a University employee and Deputy Laboratory Counsel, for his opinion as to whether IMD 6102 mandatorily disqualified a one-eyed individual from employment as a security inspector. Walterscheid informed Pogna that he interpreted the disqualification to be mandatory and not subject to review. Shortly after consulting with Walterscheid, on April 1, 1983, Pogna sent a memorandum to Hardwick setting forth Walterscheid's opinion. Upon receipt of the memorandum, Hardwick sent word through Mason & Hanger's counsel to DeVargas' counsel that Mason & Hanger maintained its position that DeVargas was disqualified from employment under IMD 6102.[6]

DeVargas never reapplied for a position as a security inspector under the 1984 successor regulations to IMD 6102,

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[5] Contrary to his assertion (Pet. at 5), DeVargas never reapplied for the position, in 1983 or thereafter.

[6] Respondent Kerr was also a University employee in 1983 and was then Director of the University's operations at the Laboratory. Kerr had no involvement in, or knowledge of, the events relative to DeVargas' application.

under which medically disqualified but otherwise fully qualified applicants may be considered for waiver by DOE.

B. Proceedings Below

This action was initially filed on November 8, 1983. Defendants below were the current respondents plus the University, DOE, certain officials and employees of DOE, and fictitious individuals. After discovery and preliminary motions, on July 26, 1984, the District Court granted DeVargas' request to file an amended complaint. The first amended complaint alleged violations of § 504, violations of 42 U.S.C. § 1983 (1988) [hereinafter § 1983], and direct violations of various provisions of the Constitution. With regard to the basis for his § 504 action, DeVargas pleaded solely that the prime contract and subcontract were in fact awards of assistance and therefore subjected the University and Mason & Hanger to § 504 liability. With regard to IMD 6102, DeVargas alleged that he was entitled to a waiver of his disqualification and that all of the defendants discriminated against him in denying that waiver.[7]

After further discovery, on October 10, 1984, defendants filed a comprehensive consolidated motion to dismiss and for summary judgment, along with certain other motions on particular procedural and jurisdictional matters. On April 9, 1986, the District Court entered a Memorandum Opinion and Order which, among other things, dismissed the § 504 claim

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[7] DeVargas alleged discrimination on the basis of handicap, national origin, freedom of association, and speech, as well as a conspiracy among all the defendants, as the reasons that defendants refused to process his application.

and the derivative § 1983 claim based on § 504 on the basis that the contracts at issue were not awards of assistance. (Pet. App. at 2a-10a).

Because the District Court had denied defendants' motion for summary judgment, on June 9, 1986, all remaining defendants filed a supplemental motion, urging the District Court to reconsider its earlier ruling and to grant summary judgment in favor of all defendants on the grounds of qualified good faith immunity. On October 21, 1986, the District Court entered a second Memorandum Opinion and Order, finding that the facts established in the record supported qualified good faith immunity as to all of DeVargas' § 1983 claims and granting summary judgment on that basis to all DOE and University employees. (App. at 3a-6a). The District Court, however, denied qualified good faith immunity to Mason & Hanger and all Mason & Hanger employees on the basis of lack of governmental status. (App. at 6a-8a).

Following that ruling, the Mason & Hanger defendants filed a collateral order appeal to the Court of Appeals. On April 7, 1988, the Court of Appeals entered an opinion affirming the grant of qualified good faith immunity and extending it to all defendants. 844 F.2d at 718-25 (Br. App. at 24a-43a). In the course of its opinion, the Court of Appeals held that IMD 6102 § A.6.b(8) stated a mandatory disqualification that was not subject to waiver. 844 F.2d at 725 (Br. App. at 41a-42a).

In the meantime, however, fairly extensive discovery had been taken in the District Court proceedings and, on April 4, 1988, three days before the Court of Appeals ruled on the qualified good faith immunity appeal, DeVargas was allowed to amend his complaint again.

On May 20, 1988, defendants filed a consolidated motion for summary judgment directed to all of the claims in the second amended complaint. On December 14, 1988, the District Court entered a Memorandum Opinion and Order dismissing the case in its entirety. (Pet. App. at 29a-39a). In this opinion, the District Court recognized the Court of Appeals' holding, and held, itself, that IMD 6102 § A.6.b(8) was mandatory and not subject to waiver. (Pet. App. at 37a-38a).

Throughout the proceedings in both the District Court and the Court of Appeals, DeVargas argued the existence of § 504 liability based solely on his contention that the prime contract and the subcontract were awards of assistance under the Atomic Energy Act of 1954, *as amended* 42 U.S.C. §§ 2011-2013, 2051 (1988). (*See* Pet. App. at 2a-8a, 48a-50a). At no time in the proceedings before the District Court, in his docketing statement, in his briefing on appeal, or in his oral argument in March 1990 did DeVargas mention the Restoration Act or any of the changes in § 504 made by the Restoration Act.[8] DeVargas first raised this issue in a letter to the Court of Appeals filed after oral argument.[9]

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[8] Indeed, the version of § 504 that was set forth and briefed in both DeVargas' appellate brief and the federal defendants' appellate brief (cross-adopted on the § 504 issue below by respondents) was the pre-Restoration Act version.

[9] DeVargas' letter to the Court of Appeals following argument erroneously premises its propriety on a claim that counsel for respondents raised the issue of program specificity in oral argument. What counsel pointed out to the Court of Appeals on argument was that the University and Mason & Hanger are different entities, a matter discussed below (at 15-20) that goes beyond program specificity and does not implicate the retroactive application of the Restoration Act.

Because the issue of retroactive application of the Restoration Act was raised by letter after oral argument, neither respondents nor the federal defendants, who were represented before the Court of Appeals by counsel from the United States Department of Justice, had the opportunity to make a presentation to the Court of Appeals on the issue of retroactive application of the Restoration Act or possible alternatives to that issue.

The Court of Appeals affirmed judgment on all grounds. It chose to approach the § 504 issue on two different bases. First, it held that the Mason & Hanger defendants – Respondents Mason & Hanger, Hook, and Hardwick – were not liable because Mason & Hanger did not receive federal financial assistance through its contract within the meaning of § 504. 911 F.2d at 1382-83 (Pet. App. at 48a-50a). Then, it went on to decide the application of § 504 to the University defendants – Respondents Kerr, Pogna, and Walterscheid – and to the remaining federal defendant – Gary Granere, not named as a respondent here – on the basis that the Restoration Act is not subject to retroactive application. 911 F.2d at 1383-93 (Pet. App. at 51a-72a).

REASONS FOR DENYING THE WRIT

I. THE OPINION OF THE COURT OF APPEALS WITH REGARD TO THE APPLICATION OF THE RESTORATION ACT IS CORRECT AND, IN ANY EVENT, IS ONE OF VERY LIMITED IMPACT.

Respondents fully support the decision of the Court of Appeals that the Restoration Act does not have retroactive effect and urge that it is correct in its result. Respondents can

add little to the original, well-reasoned, and impressively thorough decision of the Court of Appeals on this point.

By its very logic and application, however, the decision of the Court of Appeals is limited to the Restoration Act, itself. The holding requires and undertook a searching review of the language and legislative history of the particular statute at issue. 911 F.2d at 1385-88 (Pet. App. at 53a-62a). Although respondents do not have access to any sort of index by which they can quantify a precise number of cases, it is reasonable to presume that only a very few cases remain to which the question of retroactivity of the Restoration Act could apply.[10] Thus, although there is a split in the Circuits on this issue, the actual application and influence of the decision below will likely be quite limited.[11]

Although DeVargas argues that the Court of Appeals' decision is inconsistent with congressional intent (Pet. at 14-16), the holding of the Court of Appeals speaks for itself in this regard, having diligently searched and found there to be no clear congressional intent in the language and history of

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[10] A search on Westlaw for all cases using the term, "Restoration Act," located only two instances wherein Courts of Appeals have remanded cases to district courts for consideration of whether the Restoration Act applies retroactively: *Kohl v. Woodhaven Learning Center*, 865 F.2d 930, 941 n.7 (8th Cir.), *cert. denied*, 110 S.Ct. 239 (1989), and *Jeldness v. Watson*, 857 F.2d 1478 (9th Cir. 1988) (unpubl. table opin.) (WESTLAW, CTA database at 8). Respondents have ascertained from counsel in those cases that the *Kohl* case has been dismissed, while the *Jeldness* litigation is still active. *See also Pfeiffer v. Marion Center Area School Dist.*, 59 U.S.L.W. 2294 (3d Cir. Oct. 30, 1990) (WESTLAW, 1990 WL 163389 at 18).

[11] Moreover, the holding of the Tenth Circuit is a panel decision which, if in error, may later be corrected by the Court of Appeals *en banc*. DeVargas filed no suggestion for rehearing *en banc* in this case.

the Restoration Act to apply the statute retroactively. 911 F.2d at 1385-88 (Pet. App. at 53a-62a). In addition, the outcome under the particular facts of this case should be the same regardless of whether the Restoration Act is applied retroactively.[12] Accordingly, the result in this particular case can in no way be said to be inconsistent with congressional intent.

DeVargas also argues (at 16-18) that the import of the issue with regard to the Restoration Act is heightened by the Court of Appeals' resolution of the "apparent tension" between *Bradley v. Richmond School Board*, 416 U.S. 969 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). *See* 911 F.2d at 1388-93 (Pet. App. at 62a-72a). This construction, while of significant legal interest, cannot be said to represent specific differences in the Circuits, as the outcome of a review conducted under the particular method of analysis adopted by the Court of Appeals here will not necessarily conflict with the outcome of a review conducted by another method in any particular situation. Moreover, any attempt to articulate the specific method of interpreting congressional intent for all statutes must have import beyond the civil rights area and is fraught with problems of anticipation. The Court has recently chosen not to address this issue of construction, even when the opportunity clearly presented itself. *See, e.g., Kaiser Aluminum & Chem. Co. v. Bonjorno*, 110 S. Ct. 1570, 1576-77 (1990).

A final matter that argues against granting *certiorari* is the fact that DeVargas has chosen to drop the last federal defendant – Gary Granere, Acting Manager of the DOE Los Alamos Area Office – as a respondent herein. (*See* Pet. at 2d

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[12] *See infra* at 15-29.

unn. p.). Removing Granere as a respondent leaves only non-federal respondents and means that the federal government will not appear to argue either the proper method to determine congressional intent with regard to retroactive application of federal statutes or the proper interpretation of the particular DOE regulations at issue.[13] Certainly there should be input from the federal government as to the issues presented in this case, if they were to be decided.

Thus, because the issue presented has been correctly decided and, in any event, is one of very limited impact, the Court should deny issuance of a writ of *certiorari*.

II. THE SAME RESULT SHOULD BE REACHED REGARDLESS OF RETROACTIVE APPLICATION OF THE RESTORATION ACT.

Pursuant to Supreme Court Rule 15.1, this portion of the brief sets forth in detail what additional issues are involved in resolving the question posed by DeVargas in his Petition. The proper resolution of these issues in light of the record in this case demonstrates that it is unnecessary even to reach the issue of retroactive application of the Restoration Act, because the same result should obtain regardless of whether the Restoration Act is given retroactive application.

A. Mason & Hanger Is Neither a "Recipient" of Federal Financial Assistance Nor Part of the "Operations" of the University.

DeVargas continues, as he did below, to ignore the fact that the Laboratory is a DOE facility and that the contracts at

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[13] *See infra* at 23-26.

issue are part of a procurement contract system created for the benefit of the federal government. The statement in the Petition (at 5) that the University chose to delegate some of its duties to Mason & Hanger ignores the extensive record established below through the congressional hearings on the transfer of the previously federally employed security force at the Laboratory.

DeVargas assumes that Mason & Hanger, or at least the function performed by Mason & Hanger at the Laboratory, is a program of the University, and that once program specificity is removed by retroactive application of the Restoration Act, liability imparts to the University under § 504 for the actions of Mason & Hanger, because of federal assistance or grants received somewhere in the University's educational system.

Mason & Hanger, however, is not a program of the University performing the University's operations. Mason & Hanger and the University are separate entities performing separate functions in the service of the federal government at the Laboratory. Mason & Hanger is not a recipient of federal financial assistance. There is nothing in the Restoration Act, even if applied retroactively, which would make the University or its employees liable under § 504 for Mason & Hanger's failure to employ DeVargas, or make Mason & Hanger or its employees liable under § 504 based on receipt of federal grants or assistance by the University somewhere in its educational system.

The University operates facilities at the Laboratory on behalf of DOE. When the Laboratory was established as a permanent federal facility following World War II, the University declined to be involved in operations at the Laboratory

other than scientific and technical operations. *Hearings* at 25. Prior to May 1981, the protective service at the Laboratory was a federally employed force. At the behest of the federal Office of Management and Budget ("OMB") and DOE, competitive bidding was initiated to ascertain whether a private contractor could supply an enhanced protective force more economically than could the federal government. *Id.* at 7-14, 18-19, 21-22. Pursuant to OMB competitive bidding, with input from DOE and a congressional subcommittee, Mason & Hanger was selected to provide the private security force at the Laboratory. *Id.* That selection and subsequent subcontract were for the benefit of the federal government and the nation as a whole, not for the benefit of the University. Although Mason & Hanger's contract is structured so that it operates as a subcontract to the University's prime procurement contract, that structure merely dictates how contractual payments flow from DOE through the University to Mason & Hanger. The University reaps no financial benefit from its subcontract with Mason & Hanger.

The University's role in operating the Laboratory has never included the provision of security forces. While the University has some input and control over the security force for purposes of strength, deployment, and coordination, similar to the input and control that it had with the federally employed force, it is Mason & Hanger, not the University, which is charged with employing, training, and providing security personnel, as well as ensuring that those activities comply with appropriate federal regulations.

Thus, the provision of security forces is not part of the "operations" of the University at the Laboratory, and the operations of Mason & Hanger do not fall under the "all

operations" provision of § 504(b) for purposes of the University.

In addition, DeVargas applied for employment with Mason & Hanger, not with the University. It is Mason & Hanger which declined to process DeVargas' application. Although Mason & Hanger personnel, in an appropriate abundance of caution, sought advice from University personnel to ensure that they were proceeding in accordance with the mandatory federal regulation involved, ultimate responsibility for employing and providing the security force remains with Mason & Hanger, not with the University.

DeVargas apparently would urge that § 504 is no longer limited in coverage to the entity that receives federal funding, but that anytime a subject organization (or at least a university) has a contract with another organization, both organizations fall under § 504 liability and liability flows in both directions. That position, however, cannot be sustained in light of prior holdings of the Court under § 504, the plain language of the Restoration Act, or its legislative history.

Prior to enactment of the Restoration Act, the Court squarely held in *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 605-08 (1986), that the recipient of federal financial assistance under § 504 was the *entity* that actually received the federal financial assistance, because coverage of § 504 was in the nature of a contractual cost which could be terminated at the choice of the covered entity to avoid liability. The Court specifically rejected the concept of liability vicariously extending from one entity to another. *Id.* at 608. Although Congress intended in the Restoration Act to overrule program specificity within

entities by providing extensive definitions of the term, "program or activity," neither those changes nor the legislative history of § 504 indicate any intent by Congress to expand liability beyond the specific entity actually receiving federal financial assistance. *See* § 504(b); S. Rep. No. 64, 100th Cong., 1st Sess. 16-20 (1987).[14] Where Congress intended to cover associated or affiliated organizations in the Restoration Act, it did so specifically. *See* § 504(b)(4);[15] S. Rep. No. 64, *supra*, at 19-20.

Liability under § 504 does not reach contractors of covered entities.[16] To be covered under § 504(b)(3), a corporation

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[14] Indeed, the Senate Committee on Labor and Human Resources, which issued the only legislative report on the Restoration Act, stated specifically that the Court's ruling in *Paralyzed Veterans* was preserved under the Act.

> [The Restoration Act] does not overrule or alter the Supreme Court ruling in the case *Department of Transportation v. Paralyzed Veterans of America*, -- U.S. --- (1986), that airline companies are not recipients of federal financial assistance as a result of their use of federally-assisted airports or federal air traffic controllers.

S. Rep. 64, *supra*, at 29.

[15] DeVargas' expansive reading of the Restoration Act would render as surplusage the precise language of § 504(b)(4).

[16] A strikingly similar case on this issue is *O'Keefe v. Niagara Mohawk Power Corp.*, 714 F. Supp. 622, 630-31 (N.D.N.Y. 1989). The plaintiff there was an instructor hired by a subcontractor of Oak Ridge Associated Universities ("Oak Ridge"), a DOE prime contractor, to teach courses at facilities operated by Oak Ridge. When the subcontractor fired the plaintiff, the plaintiff sued the subcontractor under § 504 and a panoply of claims similar to those made by DeVargas below. Relying on the authority of *Paralyzed Veterans*, the court in that case dismissed the claims under § 504, holding that, although Oak Ridge clearly received federal funding and was subject to § 504 liability, that fact did not subject the subcontractor-employer to § 504 liability.

must receive the federal grant or assistance itself; it cannot be vicariously liable for the receipt of assistance by another entity, unless it is created by that entity under § 504(b)(4). *See* S. Rep. 64, *supra*, at 17-19. And the entity with which a corporation contracts (here the University) cannot be held vicariously liable under § 504 for the acts of the contracting corporation,[17] particularly where, as here, the corporation itself is not liable under § 504.

In sum, the University and Mason & Hanger are different entities performing different functions at the Laboratory. Mason & Hanger is neither a "recipient" of federal financial assistance nor part of the "operations" of the University. Accordingly, the same result should be reached regardless of the retroactive application of the Restoration Act.

B. Judgment Should Be Affirmed on the Ground That the Contracts at Issue Are Not Awards of Assistance and Do Not Create a Basis for Liability Under § 504.

The Court of Appeals approached the § 504 issue on two different grounds. First, it held that the Mason & Hanger defendants were not liable under § 504, because Mason & Hanger's subcontract is not an award of assistance, and Mason & Hanger, therefore, does not receive federal financial assistance. 911 F.2d at 1382-83 (Pet. App. at 48a-50a). Then, the Court of Appeals went on to decide the application of

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[17] *See Eivens v. Adventist Health Sys./E. & Middle America, Inc.*, 651 F. Supp. 340, 343 (D. Kan. 1987) (holding under *Paralyzed Veterans* that a hospital holding company is not subject to § 504 liability based on receipt of federal assistance by the individual corporate hospitals).

§ 504 to the University and federal defendants on the basis that the Restoration Act is not subject to retroactive application. 911 F.2d at 1383-93 (Pet. App. at 51a-72a).

1. Judgment Was Entered in Favor of the Mason & Hanger Respondents on Grounds Independent From the Consideration of the Retroactive Application of the Restoration Act.

The Court of Appeals did not, and did not need to, reach the issue of the retroactive application of the Restoration Act in order to affirm the judgment in favor of the Mason & Hanger respondents. There is no evidence of financial assistance to Mason & Hanger in the record. Because the Court of Appeals affirmed judgment in favor of the Mason & Hanger respondents on grounds independent from the question presented in the Petition, the Mason & Hanger respondents – Mason & Hanger, Hook, and Hardwick – should be dismissed from this proceeding.

2. Judgment Below Should Be Affirmed for the University Respondents on the Same Ground as That for the Mason & Hanger Respondents.

The sole issue presented and litigated below with regard to § 504 was whether the contracts at issue were in fact awards of assistance. There is no evidence in the record of any federal grant or assistance to the University (outside of DeVargas' claims with regard to the contracts), because other grants were never at issue below.

There is no reason on the basis of the claims presented and state of the record to treat the University respondents – Respondents Kerr, Pogna, and Walterscheid – differently from

the Mason & Hanger respondents. Accordingly, judgment should be affirmed for all respondents on the basis that the contracts are not awards of assistance, without the necessity of reaching the issue of retroactive application of the Restoration Act.

C. An Action for Damages Under § 504 or § 1983 Cannot Be Maintained Against the Respondents on the Basis of the Record in This Case.

The only remedy even arguably remaining for DeVargas under § 504 or his derivative claim of violation of § 504 rights under § 1983[18] is that of damages.[19] The Court of Appeals avoided reaching the "open issue" of the availability of damages under § 504 by ruling instead on the retroactive application of the Restoration Act. 911 F. 2d at 1393 n.12 (Pet. App. at 73a n.12). Resolution of that issue, however, is unnecessary to this action, as DeVargas' current allegations fail under the record in this case to provide any basis whatsoever for a claim for damages either directly under § 504 or derivatively under § 1983.

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[18] The Court of Appeals dismissed DeVargas' derivative § 1983 claim on the ground that there was no basis for his underlying § 504 action. 911 F.2d at 1394 (Pet. App. at 74a-75a). It is unclear whether DeVargas intends to continue to pursue his § 1983 action along with his direct § 504 claim.

[19] The District Court dismissed all declaratory and equitable relief, including backpay, as relief, on the bases that IMD 6102 was mandatory and properly followed, that IMD 6102 had been superseded in 1984 by regulations under which an otherwise fully qualified applicant could be considered for waiver, and that DeVargas had not reapplied for a security inspector position under those successor regulations. (Pet. App. at 37a-39a). DeVargas did not appeal this dismissal to the Court of Appeals. *See* 911 F.2d at 1382 (Pet. App. at 48a).

1. Mason & Hanger Properly Followed a Federal Regulation Mandatorily Prohibiting the Employment of One-Eyed Individuals as Security Inspectors at Federal Facilities.

A determinative issue hidden in the Petition is the proper interpretation of IMD 6102. Although both the Court of Appeals, 844 F.2d at 725 (Br. App. at 41a-42a) and the District Court (Pet. App. at 37a-38a) ruled that IMD 6102 § A.6.b(8) mandatorily disqualified one-eyed individuals from employment as security inspectors without review, and DeVargas does not purport to raise that issue here, he nevertheless continues to claim that IMD 6102 provided for a medical waiver of his disability, which he was denied by respondents. (Pet. at 5). His erroneous position as to the interpretation of IMD 6102 is the linchpin of his claims under § 504 against the respondents.

In order to state a claim for damages against these respondents, Mason & Hanger must have had at least the opportunity to exercise discretion in its application of IMD 6102. If instead, as the record here demonstrates, Mason & Hanger properly followed the requirements of a mandatory federal regulation, then the appropriate action would be one against DOE officials under either § 504 or the Administrative Procedure Act, *as amended* 5 U.S.C. §§ 701-706 (1988), to effect a change in the regulation.[20] Because of the

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[20] A similar case to the present one on this issue is *Cousins v. Secretary of United States Department of Transportation*, 880 F.2d 603 (1st Cir. 1989) (*en banc*). In that case, a deaf individual was denied a job by a private employer, based on a Department of Transportation ("DOT") regulation that mandatorily disqualified deaf individuals from employment as interstate truck drivers. Just as in the present case,

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mandatory nature of the regulation at issue, any claim for damages against respondents here is without foundation.[21] It is fundamental that liability for damages under civil rights statutes only arises with regard to those persons whose discretionary acts cause the injury.[22] *See Monell v. Department of Social Serv.*, 436 U.S. 658, 692-94 (1978); *Rizzo v. Goode*, 423 U.S. 362, 370-71, 375-76 (1976).

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DOT regulations there allowed for waiver of some medically disqualifying conditions, but not for the condition at issue. *Id.* at 604. The Court of Appeals there concluded that suits of that type should be brought against the government "as regulator" only under the Administrative Procedure Act, not under § 504. *Id.* at 605-06.

[21] An example of the proper resolution of this issue may be found in the opinion of the Supreme Court of Maine in *Jackson v. Maine*, 544 A.2d 291 (Me. 1988), *cert. denied*, 109 S. Ct. 3185 (1989). In that case, an applicant for the position of school bus driver for a local school district was denied the job, because of the regulations of a state educational department which mandatorily prohibited insulin-dependent diabetics from driving school buses. The applicant sued under both § 504 and the Maine Human Rights Act, alleging discrimination on the basis of handicap against the local school district, its officials, and state agencies and officials. The trial court found the local school district contingently liable to the applicant for damages. *Id.* at 294. On appeal, the Supreme Court of Maine reversed, holding that the fact that the local school district and its officials were "entirely blameless" for the application of the mandatory regulations negated any award of damages, and rejecting "the [trial] court's attempt to retain [the local school district] as a surrogate for the State." *Id.* at 296-97.

[22] *Cf. Chaplin v. Consolidated Edison Co.*, 587 F. Supp. 519, 520 (S.D.N.Y. 1984) (holding that corporate officials who are "*responsible* for policies which violate § 504 may be liable in their individual capacities under that section") (emphasis added).

The interpretation of IMD 6102 § A.6.b.(8) as mandatory without opportunity for waiver is the only reasonable reading of the regulation that maintains its structure, language, and intended distinctions.[23] Moreover, DOE intended and consistently interpreted IMD 6102 as mandatory in disqualifying one-eyed individuals from the position of security inspector

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[23] DeVargas' cavalier interpretation of IMD 6102 as providing for medical review under IMD 6102 § A.6.c (Br. App. at 68a-69a) in all cases would read significant portions of IMD 6102 and distinctions that were contained in that regulation entirely out of existence.

The list of conditions in subpart (b) of IMD 6102 § A.6 (Br. App. at 63a-68a) contains both discretionary and mandatory disqualifications. (As to the use of the word, "shall," as mandatory, *see* IMD 6102 § a.2.b (Br. App. at 50a).) Three of the four mandatory disqualifications (numbers 2, 6, and 10) contain their own specific medical review and standards for waiver. Attempting to read the broader IMD 6102 § A.6.c provision for medical review as applicable to these mandatory provisions makes the specific medical review and standards contained in these provisions meaningless and surplusage. Only the condition of being one-eyed (number 8) among these mandatory disqualifications operated to disqualify an individual without any further medical review whatsoever.

With regard to the one-eyed condition, the most dramatic example of the misreading urged by DeVargas results from comparing the security inspector standards in IMD 6102 §§ A.5 & 6 (Br. App. at 57a-69a) with the guard standards contained in IMD 6102 § A.9 & 10 (Br. App. at 71a-78a). The two sections for the two different levels of security employee are structurally similar and contain similar medical review standards. IMD 6102 § A.9.b(5) (Br. App. at 72a) provides that "[o]ne-eyed individuals *may qualify*" to be guards, subject to medical review, while IMD 6102 § A.6.b(8) (Br. App. at 67a) provides that "[a] one-eyed individual *shall be medically disqualified* for security inspector duties." (Emphasis added.) Despite the obviously different intent of these two sections, DeVargas' interpretation would treat applicants for the two different security positions in exactly the same manner.

without review.[24] With regard to complex administrative regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977).

Mason & Hanger here properly followed a federal regulation that mandatorily prohibited the employment of one-eyed individuals as security inspectors, and, accordingly, there is no basis for any action for damages against respondents.

2. Respondents Did Not Intentionally Discriminate Against the Petitioner and Are Entitled to Qualified Good Faith Immunity.

Although a showing of intent may not be necessary to maintain an action for noncompensatory equitable relief under § 504, intentional discrimination or bad faith is a necessary element in the recovery of damages or other compensatory relief. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2, 607 n.27 (1983) (decision under Title VI of the Civil Rights Act of 1964);[25] *Consolidated Rail*

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[24] In support of summary judgment, defendants submitted the sworn declaration of Martin J. Dowd, who was Deputy Director of the Office of Safeguards and Security for DOE, a position which involved management responsibility for protection policies of DOE, including interpretation of those policies. Mr. Dowd's affidavit concerns DOE's intent, development, and interpretation of IMD 6102, particularly the provision requiring security inspectors to have sight in both eyes. Mr. Dowd states that IMD 6102 § A.6.b(8) was intended and consistently interpreted by DOE as requiring sight in both eyes and was not subject to qualification or waiver by either DOE or a contractor.

[25] The remedies for a violation of § 504 are those set forth in Title VI. 29 U.S.C. § 794a(a)(2) (1988). The Courts of Appeals have applied to

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Corp. v. Darrone, 465 U.S. 629, 630-31 & n.9 (1984) (applying the decision in *Guardians* to § 504).[26] The record in this case establishes that respondents did not intentionally discriminate against DeVargas or act in bad faith. Furthermore, respondents are clearly entitled to an extension of the grant of qualified good faith immunity previously determined by the Court of Appeals.

In the present case, the District Court (Br. App. at 3a-6a; Pet. App. at 31a-36a) and Court of Appeals, 844 F.2d at 718-25 (Br. App. at 24a-43a), granted all respondents summary judgment on the basis of qualified good faith immunity on all of the DeVargas' § 1983 claims, finding factually that Mason & Hanger reasonably followed IMD 6102 in declining to process DeVargas' application. The lower courts' determination of facts applies with equal force to the same incident and decision viewed with regard to § 504 rights.

Qualified good faith immunity, of course, turns on identification of "clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). There is nothing in

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§ 504 the holding in *Guardians* on the limited availability of damages under Title VI, requiring a showing of discriminatory intent for compensatory relief under § 504. *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1427-1428 (11th Cir. 1985); *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 262-263 (5th Cir. 1984) (*per curiam*); *Timms v. Metropolitan School Dist.*, 722 F.2d 1310, 1318 n.4 (7th Cir. 1983).

[26] In *Consolidated Rail*, the Court held that backpay would be available under § 504 upon a showing of intentional discrimination, but declined to opine on the availability of further compensatory relief.

the history of § 504 or the judicial interpretation of that statute that indicates that any of the respondents should have known that § 504 was not program specific in the period from 1981 to 1983 or should have acted in a different manner as a result. Indeed, the congressional history of the Restoration Act, itself, states that early Court of Appeals' decisions had held § 504 to be program specific, even prior to the decisions of this Court in *Grove City College v. Bell*, 465 U.S. 555 (1984), and *Consolidated Rail*. S. Rep. 64, *supra*, at 10.[27] Accordingly, there is no basis whatsoever for any contention that it was clearly established, in a particularized sense, that respondents should have known that their actions would violate DeVargas' rights under § 504. *See Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987).

Although determinative of claims for damages under § 1983, a holding of qualified good faith immunity does not necessarily resolve the issue of subjective intent for purposes of a direct action under § 504. The very purpose of the doctrine of qualified good faith immunity has been to replace the element of subjective intent under § 1983 with one of objective knowledge, specifically because of the difficulty in negating allegations of intent for purposes of summary judgment. *Harlow*, 457 U.S. at 815-19. The facts established in this case, however, are sufficient also to negate any reasonable inference of intentional discrimination or bad faith and to

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[27] These pre-*Consolidated Rail* decisions are *Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981), and *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231-32 (7th Cir. 1980).

support summary judgment in favor of respondents on the issue of damages under § 504.[28]

In addition, if it were deemed necessary to urge that the theory of qualified good faith immunity should apply to direct actions under § 504 for damages against government officials or individuals in functionally equivalent positions,[29] then respondents urge the direct application of that doctrine. The costs of a subjective intent standard are as high, the distraction of public figures is as great, and the overall need for qualified immunity is as substantial in actions for damages directly under § 504 as in actions for damages under § 1983. *See Harlow*, 457 U.S. at 816-17.

Accordingly, an action for damages cannot be maintained under either § 504 or § 1983 against respondents, because they did not intentionally discriminate against DeVargas or act in bad faith, and because they are entitled to qualified good faith immunity.

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[28] *See Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983) (holding for purposes of summary judgment that, where the record establishes that the defendants are attempting to follow government guidelines, there can be no finding of intentional discrimination on which to base a claim for damages under § 504).

[29] The Court of Appeals in this case held that the Mason & Hanger respondents were entitled to be considered for qualified good faith immunity along with the governmental defendants, because of Mason & Hanger's status as a federal subcontractor, the delegation to it of the responsibility of applying and enforcing federal regulations, and an analysis of the factors articulated in *Harlow*. 844 F.2d at 720-23 (Br. App. at 30a-37a).

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied. In the alternative that the Court were to choose to review the judgment below, a writ of *certiorari* should be issued only with respect to Respondents Kerr, Pogna, and Walterscheid and only for the purpose of summary affirmance or remand to the Court of Appeals.

Respectfully submitted,

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